Appendix D

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES
Two Gateway Center
Newark, N.J. 07102

IN THE MATTER OF THE PETITION OF THE COUNTY OF ESSEX FOR A FRANCHISE AND APPROVAL OF CONTRACTS WITH SOLID WASTE TRANSFER AND RECYCLING, INC., AND WASTE MANAGEMENT OF NEW JERSEY, INC., AND THE CO-APPLICATION OF ESSEX COUNTY AND SOLID WASTE TRANSFER AND RECYCLING, INC., FOR CERTIFICATION OF PUBLIC CONVENIENCE AND NECESSITY AND FOR OTHER SUPPLEMENTAL	)	SOLID WASTE *ORDER MODIFYING INITIAL DECISION* DOCKET NOS. SE87070552 SE87060566
* * * * * * * * * *		
IN THE MATTER OF THE COUNTY OF ESSEX (1) FOR APPROVAL AND CONTINUATION OF INTERIM SOLID WASTE DISPOSAL RATES AND (2) FOR APPROVAL OF CUBIC YARD CONVERSION RATIO OF 3:1	)	OAL DOCKET NO. PUC3173-88

H. Curtis Meanor, County Counsel, Norman Schulaner, Assistant County Counsel, Frank Becz, Assistant County Counsel, Sheila Genovese, Assistant County Counsel, and Thomas Bachman, Assistant County Counsel, for the County of Essex, petitioner.

(H. Curtis Meanor, County Counsel attorney)

Joseph M. Cerra, Esq., Charles A. Reid III, Esq., and Antoinette Bennet, Esq. for Solid Waste Transfer and Recycling Inc., petitioner

(Shanley & Fisher, attorneys)

Theodore A. Schwartz, Esq. and Sandra T. Ayres, Esq., for Waste Management of New Jersey, Inc. respondent

(Schwartz, Tobia and Stanziale, attorneys)

Howard T. Rosen, Esq., Thomas A. Penn, Esq., Harvey C. Kaish, Esq., and Richard Epstein, Esq., for the City of Newark, intervenor

(Clapp & Eisenberg, P.C. attorneys)

Michael Critchley, Esq., for the City of Orange, intervenor

John M. Malyska, Esq., and Jane E. Solomon, Esq., for the Township of Glen Ridge, intervenor

(Meyner & Landis, attorneys)

Thomas McCormack, Esq., for the Township of Caldwell, intervenor

(McCormack & Petrolle, attorneys)

Mumtaz Bari-Brown, Deputy Public Advocate, Badrhn M. Ubishin, Assistant Deputy Public Advocate, Amy P.K. Motzenbecker, Assistant Deputy Public Advocate, Jacqueline Hardy, Assistant Deputy Public Advocate, Ellen B. Maughn, Assistant Deputy Public Advocate, Joseph Quirolo, Assistant Deputy Public Advocate, and Philip Bauknight, Assistant Deputy Public Advocate, for the Division of Rate Counsel, Department of the Public Advocate, intervenor

(Wilfredo Carabello, Public Advocate of New Jersey, attorney)

BY THE BOARD:

On July 16, 1987, the County of Essex (Essex, County or petitioner) filed an application with the Board of Public Utilities (Board) for a Certificate of Public Convenience and Necessity (Certificate) for solid waste transfer stations and for approval of contracts which Essex had entered into with two companies, Waste Management of New Jersey, Inc. (WMNJ or respondent) and Solid Waste Transfer and Recycling, Inc. (Solid Waste Transfer, SWTR or petitioner) to construct and operate such transfer stations. The County requested expedited interim approval of its application in light of its need to have a disposal system in place by July 31, 1987, the effective date of a redirection of Essex County waste away from the Hackensack Meadowlands Development Commission (HMDC) landfill.

Essex filed a schedule of proposed tariffs on July 20, 1987. The Board conducted a public hearing on the County's application for initial interim rates on July 28, 1987. By order dated July 31, 1987, the Board approved the County's proposed tariff rates as interim solid waste disposal rates; accepted the contracts between Essex and Solid Waste Transfer and Essex and WMNJ; [1] issued Certificates to Essex and to WMNJ for a transfer station (Avenue A or Transfer Station) located at 100 Avenue A and to Solid Waste Transfer for a transfer station (Avenue F or Transfer Station) located at 442-444 Frelinghysen Avenue, both of which are located in Newark, New Jersey. The emergent interim rates approved by the Board in its July 31, 1987 Order were $100.15 per ton for Type 10 and $107.85 per ton for Types 13, 23, 25 and 27 waste. By Order of October 27, 1987, the Board awarded a franchise to Essex for the disposal of solid waste within the County pursuant to the Solid Waste Utility Control Act of 1970, *N.J.S.A.* 48:13A-1 *et seq.*

---

[1] By Order dated January 4, 1989, the Board clarified its acceptance of the contracts between Essex and Solid Waste Transfer and WMNJ as being interim in nature pending final decision in this matter.

On February 4, 1988, the County filed supplemental petition with the Board. Count 1 of the petition sought approval of the interim rates as permanent tariffs; and Count 3 sought approval of a compaction ratio of 3.1 cubic yards. The Board docketed Counts 1 and 3 as matters separate from the other counts in the petition and, on May 2, 1988, transmitted them to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* Essex subsequently abandoned its claims with respect to Count 3.

By Order dated August 5, 1988, this Board found WMNJ and Solid Waste Transfer to be public utilities subject to its general jurisdiction, joined them as parties to this proceeding, and compelled them to respond to discovery, giving them the option of designating themselves as either petitioners or respondents. Solid Waste Transfer subsequently assumed the status of petitioner; and WMNJ of respondent.

Evidentiary hearings commenced at the OAL on November 27, 1989. A total of 34 hearing days were held. Twenty witnesses were presented and over 100 exhibits introduced into evidence. Although several parties intervened in the proceedings, the only parties active throughout the entire proceedings were Essex, WMNJ, Solid Waste Transfer, Rate Counsel, Newark and Board Staff.

During the proceedings, the County was given notice by the Transfer Stations of claimed increases pursuant to annual Consumer Price Index (CPI) based escalator clauses contained in the contracts. By letter dated September 15, 1988, WMNJ notified the County of an increase in the service fee of 5.35 percent effective September 15, 1988. Newark filed a letter motion on September 26, 1988 seeking a declaratory ruling that no changes in tipping rates could be implemented without prior Board approval. On October 24, 1988, Essex filed a Supplement to its Petition requesting that the Board include within the scope of the County's rate proceedings, pending at the OAL, WMNJ's request for a 5.35 percent CPI increase. By Order dated January 4, 1989, the Board granted

this request and transmitted the CPI increase matter to the OAL to be made part of the pending proceeding. The Board denied Newark's motion for a declaratory order barring the CPI increase but barred implementation of CPI increases by WMNJ and Solid Waste Transfer pending resolution of their reasonableness.

On January 11, 1989, Essex filed with the Board a second Supplement to Petition so as to include in the proceedings a second noticeD of CPI increase by WMNJ of 4.66 percent effective August 1, 1989. On February 10, 1989, Solid Waste Transfer notice Essex of a CPI increase of 5.36 percent effective August 1, 1988; and on April 10, 1989, of a 5.6 percent CPI increase as of August 1, 1989. The County filed a third Supplement to Petition with the Board in February 1989 so as to include in the proceedings the notice of a 5.36 percent CPI increase from Solid Waste Transfer effective August 1, 1988.

During the pendency of the proceedings at the OAL, the Board also issued several rulings regarding host community benefits. By Order dated June 1, 1988, the Board approved a statutory minimum host community benefit for Newark of $.50 per ton, retroactive to August 1, 1987. On September 28, 1989, Newark and Essex filed a joint petition with the Board for approval of an annual host community benefit of $3.00 per ton for all solid waste disposed of at the Transfer Stations commencing September 1, 1988, increasing to $3.50 per ton effective January 1, 1989; and to $4.00 per ton effective June 1, 1989. The Board granted this request by Decision and Order issued on July 16, 1990.

On August 13, 1990, the record in this matter was closed and on December 26, 1990 the ALJ issued her Initial Decision which was received by the Board on December 27, 1990. Through a series of Orders, the statutory time period for

Board review of the Initial Decision in this matter was extended to August 9, 1991.[2]

We have reviewed the record below, the ALJ's Initial Decision, and the exceptions and replies thereto filed by the various parties to these proceedings. There are several major areas in which we disagree with the conclusions reached by the ALJ. Those areas involve: 2.

1) the standard of review;

2) the burden of proof; and

3) the reasonableness of CPI based increases.

Each of these areas is discussed separately below.

---

[2] On August 6, 1991, shortly before the commencement of the publicly noticed Board meeting at which this was to be considered, SWTR submitted a letter claiming (1) that it had not received sufficient notice of the Board's meeting; and (2) that the Director of the OAL had not signed the Board's last extension Order in a timely manner. Consequently, SWTR argued that the Initial Decision had become effective on June 25, 1991. We find such arguments frivolous. First, the only notice to which SWTR was entitled was that required under the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.* Such notice was given by the Board. In addition, as a courtesy, the Board's Secretary contacted all parties to this proceeding by telephone one day prior to the Board's August 6, 1991 meeting. SWTR received, therefore, notice greater than that which was required by law. Secondly, it is well-settled that the automatic approval provisions of *N.J.S.A.* 52:14B-10(c), which SWTR attempts to invoke, are to be applied with caution, especially where as here, their application would result in approval of an Initial Decision directly contrary to the agency's decision. See *King v. New Jersey Racing Commission*, 103 *N.J.* 412, 422, *Aurentz v. Planning Board of Little Egg Harbro Township*, 171 *N.J. Super* 135, 142 (Law Div. 1979). Here, the Board's extension Order was voted by the Board on June 19, 1991, was signed by the Board on June 24, 1991 and was submitted to the OAL on that date -- all prior to the expiration of the review period. That the Order was not co-signed by the OAL Director until a later date is a technicality which should not be viewed as barring the Board's instant decision. Even if SWTR were correct, however, we note our authority to reopen and reconsider any decision. Consequently, SWTR has based its argument on, at most, a harmless error.

I. *Standard of Review*

The ALJ premised her Initial Decision upon the conclusion that the contracts under review were negotiated on an arm's length basis in a competitive market and are, therefore, just and reasonable. In so doing, the ALJ ignored an express direction by the Board, in its February 10, 1989 Order, that the ALJ make findings concerning the reasonableness of the rates under a cost-based ratemaking analysis. The Board ordered that the case proceed under *both* the traditional rate base/rate of return approach as well as under the theory advocated by the transfer stations, namely, that the contracts were negotiated on an arm's length basis in a competitive market. The Board Order further indicated that at the conclusion of the case the Board would make a determination as to whether one or the other or possibly some combination of these two approaches should be applied in determining whether the contract fees are just and reasonable. The Board's February 10, 1989 Order explicitly stated:

> The record in this protracted case does not support WMNJ's position that the Board should ignore traditional rate base/rate of return analysis and rely exclusively on the theory that the contracts were negotiated on an arm's length basis in a competitive market. Rather it supports the conclusion that the case should go forward under both approaches, and when all the evidence is in, a judgment be made whether one or the other, or possibly, some combination of them be applied to determine whether the contracts' fees or charges are just and reasonable.

The ALJ, therefore, had an obligation under the Board's Order to analyze the contract rates from a cost-of-service standpoint and failed to do so.

In addition, through a series of Orders, beginning with our August 5, 1988 Order in this matter, the Board put Essex and the transfer stations on notice that contract charges and fees would not be accepted absent proof as to reasonableness. The Board's February 10, 1989 Order indicated that the contracts

were not subject to normal competitive conditions, but rather, were negotiated under the time pressures of an emergency situation. Far from freeing petitioners from their legal obligation to support the reasonableness of their rates via traditional ratemaking analysis, we specifically required cost-based data.

Our review of the record in this case persuades us that performance of a cost-based analysis of the proposed rates is imperative and we reject the ALJ's finding to the effect that such analysis need not be conducted because the contracts in question were negotiated on a competitive basis. We find that the contracts and the resulting rates were not competitively negotiated due to the fact that Essex County faced a July 31, 1987 deadline at the HMDC landfill. The County's only viable option was to enter into agreements with WMNJ and SWTR (Transcript, January 11, 1990, p. 40). The County's bargaining position was weak and not competitive because the transfer stations were awarded contracts and were incorporated into the solid waste management plan before a price had been agreed upon. (Transcript, January 11, 1990, pp. 36-37, 9[illegible], Exhibit P-1). In short, by the time price was negotiated, the County was locked in to the SWTR and WM transfer stations.

The ALJ's finding that despite its weak bargaining position Essex nevertheless "engaged in informed and intense negotiations regarding contract price", (Initial Decision, p. 97) is contradicted by the facts. Essex County, facing an immutable deadline, was, in effect, at the mercy of the only two entities who could logistically provide service by the July 31, 1987 date. That Essex let the contracts in accordance with law, that the procedures followed were appropriate, and that Essex made a full effort in negotiations, does not negate the fact that a competitive setting, with many able and willing sellers of services providing bids, simply did not exist. Normal competitive pressures cannot, therefore, be relied upon to assure the fairness of rates since the transfer stations had no competition when price was actually negotiated.

The ALJ points to the fact that the County received nine responses to the Solicitation of Interest (Initial Decision, p.

101). The reality was, however, that only four of the nine initial responses included a specific site for a transfer station (P-SWTR-4, p. 1; Initial Decision, p. 28), and only one of these four, SWTR, offered sufficient committed landfill capacity (Transcript, January 11, 1990, p 4; Initial Decision, pp. 30-31). Thus, the fact was not that the WMNJ and SWTR proposals were "technically superior to others," as mischaracterized by the ALJ (Initial Decision, p. 102), but rather that, as SWTR witness Mr. Karpinsky testified, SWTR and WM (when it later designated a site) were "basically" the only two responders that were qualified to perform the job (Transcript, January 11, 1990, pp 20-24).

The ALJ citing the testimony of Solid Waste Transfer's witness Mark Mauriello, found that the County "negotiated one vendor against the other" and took a "take-it or leave-it" stance with SWTR. (Initial Decision, pp 50-52). However, Mark Mauriello's only involvement in the contract discussions was his presence on the day the contracts were signed. He was not involved in any of the price discussions prior to that day, and furthermore played no role in establishing the price on that day (Transcript, January 3, 1991, p. 54; Transcript, January 5, 1991, p. 6 to p. 7). More importantly, in view of the circumstances, the County could not possibly "negotiate one vendor against the other." Neither WMNJ nor SWTR had the capacity to handle the expected 3500-410? tons of waste. At the time in question the County had no choice but to enter into an agreement with both facilities. As Solid Waste Transfer's witness Mr. Karpinsky testified, on July 1, 1987, the County's only alternative to garbage piling up on the streets on August 1, 1987 was to enter into contracts with WMNJ and SWTR (Transcript, January 11, 1991, pp 10-16).

In view of the above, the case for the fairness of the rates charged by the transfer stations must not rise or fall on the basis of the ALJ's perception of the negotiating skill of Essex County, which negotiated amidst an unprecedented crisis under a duopoly structure, but rather must be based on the circumstances which actually existed. Those circumstances belie

a competitive market. In the absence of competitive pressures ensuring reasonable rates, this Board will utilize a cost-of-service approach to determine the reasonableness of Essex County's rates. Such an analysis is set forth in Section IV of this Order.

II *BURDEN OF PROOF*

It is axiomatic that the burden of proof in a utility rate proceeding is on the utility. *Public Service Coordinated Transport of New Jersey* 5 *N.J.* 196,219 (1950); *In re Application of Saddle River*, 71 *N.J.* 14, 25-26 (1976). Although the ALJ acknowledges, at pp. 11-12 of her Initial Decision, that the burden of proof is on the utility seeking rate approval, she nevertheless placed the burden of presenting a cost-based analysis on Board Staff, Rate Counsel and the City of Newark. She did so by refusing to require the utilities herein to provide a rate of return/rate base analysis, reasoning that "...WMNJ and Solid Waste Transfer should not be ordered to present an affirmative case based on any specific methodology and/or to present evidence of a specific nature, Initial Decision, p. 11. We disagree. This Board, and the ALJ, in her role as hearer of fact, had the authority to require the utilities herein to provide all data and computations necessary to develop the fullest record for Board review. This could have, and, in light of the Board's February 10, 1987 Order, should have been done without prejudice to the utilities' position that a competitive market analysis should govern any ultimate determination. We once again emphasize, therefore, that the burden of demonstrating the reasonableness of the proposed rates was on the utilities herein and not on any other party to these proceedings.

III *THE REASONABLENESS OF CPI-BASED AUTOMATIC INCREASES*

As previously noted, the service contracts at issue herein contain provisions for automatic increases linked to increases in the CPI. Pursuant to such CPI provisions, Essex County has been billed as follows:

1) WMNJ has billed Essex for a 5.36 percent CPI cost-of-living price increase effective September 19, 1998, which claim totals $530,498 for 1988 and $1,909,921 for 1989.

2) Solid Waste Transfer has claimed and billed Essex for 5.36 percent CPI cost-of-living price increase effective August 1, 1988, which claim totals $312,146 for 1988 for Type 10 waste, $704,178 for 1989 for Type 10 waste, $519,080 for 1988 for Types 12, 23, 25 and 27 waste, and $1,210,450 for 1989 for Types 13, 23, 25 and 27 waste.

3) WMNJ has claimed and billed Essex for a 4.6 percent CPI cost-of-living increase effective August 1, 1989, which claim totals $732,564 for 1989.

4) Solid Waste Transfer has claimed and billed Essex for a 4.66 percent CPI price increase effective August 1, 1989, which claim totals $273,244 for 1989 for Type 10 waste and $408,395 for 1989 for Types 13, 23, 25 and 27 waste.

The ALJ accepted as reasonable the automatic CPI-linked increases provided for in the contracts been Essex County and the transfer station operators, again reasoning that the CPI provisions were part of a competitively bid contract. She conducted no cost analysis with respect to the CPI based increases.

As set forth above, we reject the premise that a competitive market existed here. In addition, with specific reference to the reasonableness of CPI-based increases, we note that there are fundamental problems involved with linking rate increases at solid waste transfer stations to the CPI. The major components of transfer station costs are depreciation, landfill disposal costs, transportation costs, return on investment and salaries. These cost components do not automatically increase

at the same rate as the CPI. The record presented by the petitioners did not demonstrate a nexus between anticipated changes in transfer station operating costs and the CPI.

Moreover, in *In the Matter of the Application of SES Gloucester*, BPU Docket No. SE85100984, a case cited in support of the CPI-linked increases, we accepted a Producer Price Index based escalation clause only after it was tied to a rate base/rate of return analysis and coupled with an ongoing annual earnings review. We also note that there exist escalator clauses in other contracts reviewed by this Board (e.g. contracts for resource recovery plants) but that such escalator clauses are tailored to reflect the type of costs associated with the particular operation. Thus, a "weighted" or "blended" escalation formula, which takes into consideration a variety of financial indices relevant to the subject matter under review, provides the necessary assurance of reasonableness in such circumstances.

Absent such safeguards, sound regulatory policy and law militates against automatic rate increases based upon CPI escalators. The CPI reflects inflation in such areas as food, housing and electronic goods, and thus bears little relationship to increases in costs in the solid waste industry. Reflecting this policy, the Board has "consistently refused to recognize increases associated with general inflationary factors." *See Petition of Elizabethtown Water Company*, 11 *N.J.A.R.* 303, 337 (OAL 1984), *reversed on other grounds*, 205 *N.J* Super 528 (App. Div. 1985), *affirmed as modified*, 107 *N.J* 440 (1987). *See Re Jersey Central Power & Light Company*, 65 *PUR* 4th 175 (N.J.B.P.U. 19855); Re Commonwealth Water Co., 7 PUR 4th 456 (N.J.B.P.U. 1974); *In re Otter Trail Power Co.*, 21 PUR 4th 254 (S.D.P.U.C. 1977) ("The effects of inflation on a company do not in any reasonably accurate manner parallel those contained in the [the CPI]."

Accordingly, because the transfer stations failed to create a record that would support an automatic rate increase tied to a consumer price index, or in the alternative, demonstrate known and measurable cost increases which could reasonably

be foreseen, the transfer stations are not entitled to approval of the CPI-linked rate increases and we REJECT the ALJ's acceptance of such increases.

Consequently, we adjust the contracts between Essex and WMNJ and Essex and Solid Waste Transfer so as to render non-binding the CPI-linked rate increase provisions therein. We do so pursuant to our general rate making authority over public utilities as set forth in *N.J.S.A.* 48:2-21 and more specifically, pursuant to the authority vested in this Board under *N.J.S.A.* 48:13A-7 which states in pertinent part:

> The board, upon complaint or its own initiative, after hearing, may direct any person engaging in the solid waste collection business or the solid waste disposal business to furnish proof that the charges or rates to be received for such service do not exceed just and reasonable rates or charges for such.
>
> * * *
>
> Should the board find that the rates or charges are excessive then it may order the person charging such excessive rates or charges to make an adjustment in the contract to a sum which shall result in just and reasonable rates or charges.

With reference to the Board's authority to modify solid waste utility contracts, see also In *re Application of Borough of Saddle River, supra.*

IV *COST OF SERVICE ANALYSIS*

We turn now to the question of establishing a rate for the Essex County transfer stations which reflects cost of service. As previously noted, WMNJ and Solid Waste Transfer limited their presentation at the OAL to the competitive market theory. The ALJ similarly limited her analysis of the record before her. However, Board Staff, using 1988 revenue requirements did present for our consideration a cost based analysis. Staff recommended to the ALJ and to this Board certain adjustments to the interim initial rates of WMNJ and

Solid Waste Transfer. The adjustments to the interim rates recommended by Board Staff and agreements in support thereof are summarized below:

A. Adjustment to interim initial rate of WM

1) *Depreciation expense*: Staff argues that certain identified pieces of utility property (i.e., transfer trailers, vehicles and equipment, machinery) should not be included in the operations of the WM transfer station operations because said transferred utility property was not used and useful for transfer station services. This adjustment would result in a reduction of $151,018 or $.40 per ton.

2) *Intercompany interest expense*: With respect to Interest Expense — Inter Company, Staff argues that this expense is a below the line operating expense, and should be excluded in the computation of rates. Staff argues that interest compensation to affiliates is already duly reflected in rate of return. Staff recommends disallowance of this amount in WMNJ operation expenses. This adjustment would result in a reduction of $533,590 of $1.40 per ton.

B. Adjustments to the interim initial rate of SWT&R

1) *Lease Expense*:

SWTR entered into a lease agreement (Exhibit P-SWTR-1, P-2) with GLOPAK Corporation on June 22, 1987. Under the terms of the lease GLOPAK Corp. leased 4.7 acres of land located on 442-470 Frelinghuysen Avenue, Newark, New Jersey for a term of five years commencing on August 1, 1987 and ending July 31, 1992.

SWTR agreed to pay $75,000 per month or $900,000 per year. The lease agreement gave SWTR the right to demolish existing buildings on the site and to erect a structure that will remain on the premises at the expiration of the term of the lease at no cost to GLOPAK Corp. SWTR agreed to incur all costs for demolishing existing buildings on the site, and SWTR agreed to bear all costs in connection with any ECRA (Environmental Clean-Up Responsibility Act) responsibilities.

Staff notes that GLOPAK Corp. is owned by several persons. Harold Martin, Sr. owns 37 percent, his wife Barbara Martin owns 51 percent, Joseph Solomon owns 10 percent, and Cyndree Martin and Harold Martin, Jr., Harold Martin, Sr.'s daughter and son each own 1 percent. (Transcript, April 19, 1990, p. 67, lines 18-22).

Harold Martin, Sr. became shareholder in SWTR on July 23, 1987 after SWTR was designated a transfer station operator in Essex County (Transcript, April 19, 1990, pg. 118, lines 22-25). He invested $20,000 and acquired 20 percent of the equity (Prefile Testimony P-SWTR-2, p. 6). The total equity of SWTR at the time he became a shareholder was $100,000 (Transcript, April 19, 1990, p. 118, lines 14-16). Staff argues that Harold Martin, Sr.'s involvement with GLOPAK and SWTR renders the lease agreement less than "arms length". In addition, Staff notes the testimony of John O. Lasser, offered by the City of Newark as an expert to appraise the value of the property. Mr. Lasser estimated the fair net rental value as of August 1, 1987 at $129,000 per

year. Staff therefore recommends that the Board adjust lease expense accordingly.

2. *Real Estate Taxes*:

Based on Newark witness Lasser's evaluations, the $79,985.48 calculation for real estate taxes for 1989 was for the whole property of 5.7 acres. SWTR leases 4.7 acres or 82 percent of the total property. The lease states that the landlord will bill SWTR for its proportionate share. Therefore, staff recommends real estate taxes for 1989 in the amount of $65,588 or 82 percent to $79,985.48.

3. *Legal Expenses*:

Staff's recommendation regarding legal expense from January 1989 to July 31, 1990 is based on SWT&R witness Joseph Maurielo's testimony which he approximates a reduction of $175,000 of the 1988 legal expense of $436,012 (which is the amount identified in the 1988 annual report exhibit, p-16, pg. 35).

We have reviewed Board Staff's and City of Newark's proposed adjustments to WM and SWTR's interim rates and do not find them warranted. With respect to the SWTR's lease expense reduction, the ALJ found no collusive or improper relationships which would render the lease less than arms-length. We adopt her findings in this regard. Also, the Lasser appraisal was rebutted by the testimony of Richard Marashlean. In the face of two conflicting appraisals and in the presence of what the ALJ found to be an arms-length agreement, we reject staff's proposed adjustment of SWTR'S lease expense.

We similarly reject the other proposed adjustments of the City of Newark Rate Counsel and Staff to SWTR's and

WM's interim rates as not based on adequate support in the record. For all the foregoing reasons, we hereby FIND:

1. that the service contracts between Essex and WM and Essex and SWTR were not negotiated in a competitive market and, therefore, the reasonableness of rates resulting from such contracts must be based upon a cost-of-service analysis;

2. that the burden of proving the reasonableness of the proposed rate was on the utilities herein;

3. that the record is devoid of any evidence establishing a specific nexus between the costs of transfer station operation and changes in the Consumer Price Index;

4. that the CPI-based escalator clauses contained in the service contracts herein are non-binding and cannot be implemented;

5. that the record developed below supports the reasonableness of the interim rates approved by the Board in the proceeding; and

6. that neither increases nor decreases in such interim rates are warranted based on the record before us.

Therefore, the interim rates approved by this Board and currently in effect for Essex County's Avenue A and Avenue F Transfer Stations are *HEREBY* made FINAL. The Initial Decision is modified accordingly. Permanent tariff sheets conforming with this determination are to be filed with the Board within five (5) days of receipt of this Order.

DATED: August 8, 1991

ATTEST:

/s/ Chrys Wilson
CHRYS WILSON
SECRETARY

BOARD OF PUBLIC UTILITIES
BY:

/s/ Edward H. Salmon
DR. EDWARD H. SALMON
PRESIDENT

/s/ Jeremiah P. O'Connor
JEREMIAH P. O'CONNOR
COMMISSIONER

/s/ Carmen J. Armenti
CARMEN J. ARMENTI
COMMISSIONER